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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY SCOTT HAIDL, KYLE JOSEPH NACHREINER, and KEITH JAMES SPANN, Defendants and Appellants.	G036852 (Super. Ct. No. 02HF0889) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

Law Offices of Dennis A. Fischer, Dennis A. Fischer and John M. Bishop for Defendant and Appellant Gregory Scott Haidl.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Kyle Joseph Nachreiner.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Keith James Spann.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kevin R. Vienna and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Following a mistrial, defendants Gregory Scott Haidl, Kyle Joseph Nachreiner, and Keith James Spann again faced charges alleging assault by means of force likely to cause great bodily injury and eight sexual offenses including one count of rape by intoxication, one count of oral copulation by intoxication, and six counts of sexual penetration with a foreign object by intoxication. This time the jury convicted defendants of multiple counts of sexual penetration with a foreign object by intoxication (Pen. Code, § 289, subd. (e)),[1] and the trial court sentenced defendants to the midterm of six years in prison.[2] On appeal, defendants seek reversal of their convictions, claiming the trial court erroneously excluded evidence, erred in handling jury questions during deliberations and in instructing the jury, and erred in imposing a mandatory, lifetime sex

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1 All further unlabeled statutory references are to the Penal Code.

2 The jury acquitted Nachreiner of the rape count and two counts of sexual penetration with a foreign object, and acquitted Spann of one count of sexual penetration with a foreign object. The jury was unable to reach a verdict on the oral copulation allegation as to all defendants, and unable to reach a verdict on the rape offense with respect to Haidl and Spann.

offender registration requirement.[3] Defendants' contentions are without merit, and we therefore affirm the judgment.

I

FACTS

Jane Doe, a 16-year-old, straight-A high school student, met Spann near the end of her sophomore year in high school. Doe and Spann learned through friends they shared a mutual attraction to each other. They had their first sexual experience together in Doe's parked car in a residential neighborhood near Spann's home. Doe orally copulated Spann and he digitally penetrated her. They continued to see each other through June 2002.

During the summer, Doe worked as a hostess at a restaurant and socialized with her girlfriends on weekends. According to Doe, she started consuming alcohol at the beginning of her freshman year, often becoming intoxicated at parties on the weekend. Doe testified she and her friends routinely lied to their parents about their whereabouts so they could attend various parties.

On June 30, Doe attended a weekend party with her girlfriends J.S., M.M., and C.D., who was Haidl's girlfriend. Spann and Haidl also attended the party. Doe and several of her friends, including Spann, left the party for J.S.'s house, where Doe and Spann retreated to an upstairs bedroom and had sexual intercourse. M.M. testified Doe asked her to enter the room and take a picture of Doe and Spann having sex. Doe also testified Spann held a video camera while they were having intercourse, but she asked him to turn it off and believed he complied with her request.

A few days later, Doe made plans to spend the Fourth of July with C.D. and Haidl, who invited Doe and her friends to his parents' house in Newport Beach. Doe lied to her parents about her Fourth of July plans, telling them she would spend the night at a girlfriend's house so they would not expect her home until the following day. Doe

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[3] Defendants join in all issues and arguments raised by codefendants. (Cal. Rules of Court, rule 8.200(a)(5).)

impersonated a friend's mother in a telephone conversation, providing a false alibi so her friend could attend Haidl's party.

According to Doe, on the evening of July 4th, she drove her car to Haidl's house with J.S., M.M., and C.D. When they arrived around 8:00 or 9:00 p.m., Haidl and Nachreiner, whom Doe had not previously met, were drinking alcohol and playing pool in the garage. Everyone except M.M. and J.S. consumed alcohol that evening. Doe claimed that when she first arrived, she took 10 "swigs" directly from a bottle of rum and within half an hour began to feel the effects of the alcohol.

During the evening, Haidl played the videotape Spann recorded on June 30th showing him and Doe having sex. Doe claimed she paid little attention to the recording, but J.S. and M.M. testified Doe either watched for several minutes or watched the entire recording, commenting, "Look at me, I'm a porn star."

Doe testified that after Haidl played the video she consumed a shot of tequila and began to feel lightheaded. As the partygoers congregated outside by the swimming pool, Doe, unsteady on her feet, entered the pool still wearing her pants. J.S. and M.M. escorted Doe to the garden area and helped her remove her pants so she could urinate in the garden. When Doe returned to the pool, Haidl and C.D. swam and had sex in the deep end while Nachreiner stood in the water near the stairs. Doe approached Nachreiner, and while flirting with him, he pulled her into the pool and her pants came off. Doe removed her top and sat on Nachreiner's lap but, according to Doe, she moved away when Nachreiner attempted to have sex with her. J.S. and M.M., however, observed Doe having sex with Nachreiner and, when Doe exited the pool, she implored them, "Don't let me have sex with anyone else, I only want to have sex with Keith."

Doe asked Haidl to invite Spann to join the party. Because Doe was too intoxicated to drive, Haidl drove her car to get Spann, stopping on the way back to pick up marijuana. When they returned to Haidl's house around 1:30 a.m., J.S. and M.M. had fallen asleep, but the other remaining guests smoked marijuana in Haidl's bedroom. Everyone eventually left the room except Doe, who fell asleep on Haidl's bed. Haidl later woke Doe when he laid down in the bed next to her and began rubbing her

abdomen. Haidl removed her boxer shorts and they had consensual sex. Haidl attempted to penetrate her anally, but Doe refused and denied his repeated requests for anal intercourse, orally copulating him instead. Doe testified that after falling asleep again, Spann awakened her and they too had consensual intercourse and she orally copulated him.

According to Doe, when she woke up the next morning on July 5, she felt "sick to her stomach," "extremely tired," and her head hurt. She and her friends left Haidl's house in Doe's car, with M.M. driving. During the drive, Doe denied having sex with Haidl because Haidl's girlfriend, C.D., was present. After the group took C.D. home, Doe admitted to J.S. and M.M. she had sex with all three defendants the previous evening. She told J.S. and M.M. that while having sex with Haidl she thought only of how wealthy her children would be if she became pregnant; nevertheless, she tried to obtain the morning-after pill the next day, without success.

After dropping off M.M., Doe and J.S. stopped briefly at a fast food restaurant, and then Doe slept at J.S.'s house for several hours before going to work for her 5:00 p.m. to 10:00 p.m. shift. Haidl and Nachreiner called Doe at work, inviting her and her friends to return to Haidl's house that evening. Doe ultimately agreed, though she still felt tired and queasy, having eaten a single chicken strip. She initially agreed to return only if her friends would accompany her, but when they declined, she decided to go without them because she wanted to show Spann she "just wanted to be with him," not with his friends. She again lied to her parents about her plans for the evening.

When Doe arrived at Haidl's house around midnight, Haidl, Nachreiner, and Spann were playing pool in the garage. Doe drank a beer, then asked for "hard liquor," stating she wanted something that would get her drunk. Nachreiner brought her a styrofoam cup containing 8.5 ounces of 94-proof gin. Doe "gulped" it down in about 10 minutes, and also took a "hit" of marijuana packed in a pipe Haidl passed around the group. Doe felt "really dizzy" and began feeling "really, really sick" when she stood up. When asked why she drank to excess, Doe testified she had more fun when she was drunk.

Doe testified that apart from two brief moments her last memories of the evening were of Nachreiner sitting down on the couch next to her and Spann standing at the pool table talking to her. She momentarily awoke later when she hit her head "really hard" on the side of the couch, but this lasted a "split second, and that was it." Doe also remembered vomiting into her hand. The vomit spilled all over, soiling her hair.

According to Doe, her next memory was of Spann waking her in the morning for a ride home and asking where she put her keys. Doe testified she did not remember getting into her car; she found herself in the passenger seat in front of Spann's house. She was dressed, the car was hot, and the windows were "cracked just a little bit." She could smell the vomit and urine on her body. She called J.S. and asked if she could clean up at J.S.'s house before going home.

Arriving at J.S.'s residence, Doe undressed to take a shower and, when her bra fell out of her pants, she realized for the first time "something" must have happened. According to Doe, her concern increased when she felt "sore" in her pelvic area when she went to the bathroom. After her shower, she talked on her cell phone with Nachreiner and asked him "what happened" the previous night. Nachreiner laughed and responded, "Why, are you sore?"

J.S. testified that when Doe arrived at her home that morning, she had vomit in her hair, it was matted in the front, and J.S. could smell the odor of alcohol. J.S. did not notice Doe's bra protruding or any bulges in Doe's tight jeans. Nachreiner called while Doe showered and when J.S. handed the phone to Doe, she overheard Doe ask Nachreiner if she had sex with anyone. J.S. also testified that before Doe spoke to Nachreiner, she had mentioned being sore and although Doe stated she did not remember what had happened, Doe nevertheless "knew" she had sex with the boys that night. J.S. asked Doe if she realized the serious implications of her conduct, but Doe responded she would do it again. Doe slept for awhile and then left with J.S. for the home of another friend, B.F.

Doe's parents discovered she had lied about her Fourth of July plans. To locate her, they contacted her friends, and eventually found her car outside B.F.'s house.

Doe refused to leave the house until her parents threatened to call the police. Doe admitted to her parents she lied about spending the night at J.S.'s house, and revealed she had driven to Haidl's house in Newport Beach. Doe also admitted she had consensual sex with Haidl, but withheld the fact she had sex with Spann because she did not want to disappoint her parents further. She did not admit she had sex with Nachreiner. Doe did not tell her parents she had no memory of the evening of July 5th. Instead, she related details from the July 4th party as if they occurred on July 5th.

Meanwhile, on the evening of July 6, K.R. encountered his high school friends Haidl and Nachreiner at a convenience store in Newport Beach and invited them to his beach rental. The pair came over around 2:00 a.m. on July 7 and remained after K.R. went to bed. The next day, K.R.'s roommate told him he found a video camera. L.P. testified she also had been staying at the beach rental with her boyfriend. After watching about 10 minutes of the videotape in the video camera, she decided to hide the camera and tape in her car, and later gave the evidence to an acquaintance who forwarded it to the police. According to K.R., when Haidl and Nachreiner returned to the rental later that evening and searched unsuccessfully for the video camera, Haidl appeared "apprehensive" and "distraught."

Forensic serologist Brian Wraxall tested evidence collected from the parties and from Haidl's Newport Beach residence. Doe was the source of two vomit stains located between the pool table and a couch. Tests of Doe's jeans and bra and the felt on the pool table revealed Spann's sperm and semen. The felt from the pool table tested negative for urine, but positive for vaginal secretions originating from Doe. Both ends of a pool cue stick had fecal traces and amylase II originating from Doe, and the small end similarly bore traces of Doe's DNA.

Doe's father testified that on the morning of July 9, he received a telephone call from the Newport Beach Police Department stating that a videotape in police possession showed his daughter had been sexually assaulted. Doe explained that when her father questioned her, she did not know defendants had videotaped the events occurring on the evening of July 5, surmising instead the police were referring to the

videotape Spann recorded on June 30. When she admitted she knew of the videotape, she was referring to the June 30th tape. Assuming she was being confronted with evidence of the June 30th tape, she admitted having sex with Spann that evening, and not just Haidl as she had claimed earlier.

Later that day, an investigating officer interviewed Doe and her parents at the police station. Doe admitted she lied during the interview and concealed information from the police because she was scared. She stated in the interview that the Fourth of July was the first time she had sex with more than one person on the same night and that she would never consider having sex with two people at the same time.

Martin Breen, a forensic scientist in the forensic alcohol program at the Orange County Sheriff's Office, testified for the prosecution. Breen estimated that if a 16-year-old female of Doe's height and weight consumed a 12-ounce beer and 8.5 ounces of 94-proof gin within 45 minutes, while drinking the gin within 10 minutes, the female would have a blood-alcohol level .26 or .27 percent within 20 to 40 minutes. Breen explained a person who reached a blood-alcohol level of .26 or .27 under these circumstances would be in "stupor." The person would exhibit objective symptoms of impairment gross in nature, such as loss of coordination, loss of balance, slurred speech, mental disorientation as to time and space, inability to follow directions, and lack of responsiveness to questions. Breen also testified that if the person had consumed a bolus dose, which he defined as quickly consuming a high concentration of alcohol taken all at once, the rapid absorption rate could cause the person to pass out.

The jury viewed the videotape defendants recorded on the evening of July 5 and morning of July 6. The first scene depicted Haidl trying to remove Doe's top as she held a can in her hand. As the jury watched the videotape, prosecution witness Dr. Peter Fotinakes, certified in neurology and sleep medicine, interpreted the events depicted. Fotinakes's testimony focused on symptoms Doe displayed to support his conclusion she was unconscious throughout the events shown on the video.

Fotinakes found particularly noteworthy Doe's comment at the beginning of the video declaring, "I'm so fucked up." These were the only words Doe spoke

throughout the video. Fotinakes explained Doe's silence during the events depicted over a period of 30 to 39 minutes demonstrated a "certain loss of higher brain function as a result of her intoxication." Fotinakes pointed out that although the recording lasts 20 minutes, the elapsed time is closer to 30 to 39 minutes because defendants paused the tape at different times so they could reposition Doe.

After a pause on the videotape, the next scene depicted Doe nude and on her knees with her head in Nachreiner's lap, who is seated on a couch, with Spann kneeling and entering Doe from behind as she orally copulates Nachreiner. Fotinakes explained that in this position, Doe could not support her weight, but rather was wedged in between Spann's pelvis and Nachreiner's legs, with one of Doe's arms hanging limply at her side. Fotinakes explained Doe's movement in this position was the result of Spann's thrusting, and when Nachreiner no longer held her, Doe slid off the couch. She hit her face on the couch, taking no defensive action. Fotinakes pointed out that when Doe raised her head, it flopped back down, indicating she could not sustain the movement.

Fotinakes opined Doe's "rag doll" movements, limp limbs, and flaccid muscles objectively signaled her questionable consciousness. When defendants moved Doe into position to orally copulate Spann, who was standing with his pants down trying to guide Doe's mouth onto his erect penis, she fell onto his penis, provoking a gag reflex. Doe moved her arm to her face, which Fotinakes explained represented purposeful action accompanying the natural gag reflex to noxious stimulus. Fotinakes testified Doe's condition prevented her from understanding verbal communication.

Following a pause in the recording, the videotape resumed with Doe on the pool table and either Haidl or Spann penetrating Doe's vagina with a finger, and then Spann vaginally penetrated her with his penis before ejaculating on her stomach. Fotinakes pointed out that while Spann was on top of Doe, she remained passive and unresponsive, lowering her hand toward her pubis similar to her reaction to her earlier gag reflex, but she was unable to sustain the movement because of her level of

intoxication. Fotinakes testified Doe's lack of movement for over two minutes despite the penetration demonstrated Doe's "significant level of sedation and intoxication."

The next scene depicted defendants vaginally penetrating Doe's vagina with a juice bottle. Fotinakes explained that although this constituted significant stimulation, Doe's only reaction is to flex her right leg slightly, further demonstrating her severe intoxication. Fotinakes also noted Doe registered no response when defendants penetrated her with a juice can or when defendants placed the filter end of a lit cigarette into her vagina. When Spann pinched Doe's nipples, she reacted by moving both arms toward her chest, in response to noxious stimulus. At this point in the videotape, Nachreiner vaginally penetrated Doe with a pool cue. Fotinakes described how Doe made a "nonpurposeful" roll when penetrated, which he described as merely a physical response to the thrust of the pool cue. Defendants then repositioned Doe face down on the pool table and Nachreiner used the pool cue to penetrate her anus.

After another gap in the videotape, the recording resumed with Doe being slapped hard on the buttocks. Nachreiner then used the pool cue to penetrate Doe again, this time vaginally. Toward the end of the videotape, Fotinakes drew the jury's attention to what he believed was Doe's incontinence on the pool table. Fotinakes concluded, "It is obvious to anybody that she is not aware of her environment here. [I]t's not rocket science, you don't have to be an expert to understand that when a person appears to be asleep or sedated so significantly that they look like they are behaviorally asleep, that they are not responsive to their environment, and they don't know what's going on around them."

Neurologist Dr. Harris Fisk testified for the defense as the jury viewed the videotape. Fisk described Doe's movements in the videotape as responsive, demonstrating conscious, learned behavior. Fisk explained there are five different levels of consciousness ranging from alert, which Fisk described as normal, to comatose at the other end of the spectrum, which he described as totally unresponsive. Based on his observations, Fisk described Doe's level of consciousness in the videotape as "obtundation," which meant a person retained the ability to function, albeit with

impairment. Fisk explained that if one asks an obtunded person a question, a delay may occur, but with the proper stimulation, the person could respond appropriately.

According to Fisk, an obtunded person maintains conscious control of movement and thought. Fisk explained an obtunded person would have the ability to refuse consent to the activities depicted in the videotape. Explaining oral copulation as a learned behavior, Fisk concluded the video segments of Doe orally copulating Nachreiner demonstrated conscious thought and purposeful movement. Similarly, Fisk explained that relaxing the sphincter muscle is also a learned response, so that when Spann entered Doe from behind and Nachreiner penetrated Doe's anus with the pool cue, they could do so only because Doe consciously relaxed her sphincter muscle, allowing for vaginal and anal penetration. Fisk also explained that when the "liquid . . . escaped" from Doe's body, Doe's movement of her leg away from the liquid indicated voluntary control. Similarly, Fisk inferred the liquid stopped escaping when Doe chose to stop it.

Dr. Marvin Corman, a colon and rectal surgeon, also testified for the defense. After reviewing Doe's medical records, transcripts, and the pool cue portion of the videotape, Corman testified that unless a person overrides the naturally contracted sphincter muscle, it would be impossible to insert a pool cue into a person's anus without causing injury. Corman stated the absence of injury to Doe's anal canal supported his conclusion that when Nachreiner inserted the pool cue into Doe's anus, she was cooperative and aware of what was happening.

Doe testified she never consented to the acts depicted in the videotape. She never asked to orally copulate Nachreiner while Spann entered her from behind, she did not climb onto the pool table, and she did not give defendants permission to put their fingers inside her vagina while she was on the pool table. Doe also stated she did not consent to Spann mounting her to have intercourse on the pool table, and she did not ask defendants to put the juice bottle, juice can, lit cigarette, or pool cue inside of her vagina, or the pool cue inside of her anus.

Defendants presented testimony from a family practitioner who examined Doe on July 6. According to Dr. Elvira Whiteford, Doe, accompanied by her mother,

requested the morning-after pill, explaining she had engaged in consensual sex the previous evening. During the examination, Doe did not complain of soreness and claimed she had not consumed any alcohol within the past 24 hours.

Five of Doe's friends testified Doe was a liar. The witnesses did not know defendants, or only knew them as acquaintances. Some of the witnesses had known Doe for as long as 10 years and all five testified Doe was known to be a dishonest person. Two of the witnesses testified they were at Doe's house shortly after the offense when she made comments making light of, and casting doubt on, her alleged sexual assault. According to J.S., Doe stated she knew "[i]n [her] heart" she was not raped.

Defendants also impeached Doe by calling her parents as defense witnesses to testify to her dishonesty. Doe's mother, for example, admitted Doe routinely lied not only about her whereabouts, but also about her substance abuse problem.

II

DISCUSSION

A. *Exclusion of Evidence*

1. Sealed Testimony Alleging Doe Engaged in Prior Sexual Conduct

During trial, defendants filed sealed motions to admit evidence of Doe's prior sexual conduct. In support of the motion, defendants submitted a declaration from J.C., a teenage boy, who stated he and Spann had consensual sex with Doe two weeks before the July 4th party.[4] According to J.C., Doe offered to "'fuck'" him and Spann in her car. J.C. noted Doe requested beer or other alcohol before the sexual encounter, but no one obliged her. J.C. provided no evidence Doe was intoxicated during the encounter.

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[4] The declaration and other documentation supporting defendants' motions remain sealed and inaccessible to the public or press. (Cal. Rules of Court, rule 8.46(c)(1).) We address the contents of J.C.'s declaration only as necessary to fulfill our constitutional duty to decide the cause "in writing with reasons stated" (Cal. Const., art. VI, § 14.), omitting, apart from Haidl and Spann (see §§ 953, 959), "names" and "identifying facts" in the declaration (*People v. C.S.A.* (2010) 181 Cal.App.4th 773, __, fn. 1 [104 Cal.Rptr.3d 832, 835, fn. 1]; see *In re. E.J.* (2010) 47 Cal.4th 1258, 1267-1269 [discussing contents of petitioners' sealed declarations as necessary to resolve habeas claim]).

According to J.C., Haidl and other teens watched from outside Doe's car as she alternately orally copulated and had sexual intercourse with both partners, and also used a dildo and the filter end of a lit cigarette to penetrate herself sexually, similar to defendants' later use of inanimate objects to penetrate Doe as recorded on the videotape.

The Evidence Code generally prohibits the admission of "evidence of a person's character or a trait of his or her character . . . to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Under Evidence Code section 1103, however, character evidence consisting of the complaining witness's sexual conduct with the defendant is admissible to prove the witness's consent to sexual conduct with the defendant. (See Evid. Code, § 1103, subds. (c)(1), (c)(3) ["specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness" *unless* the evidence is of the complaining witness' sexual conduct with the defendant].) The conduct may also be offered for impeachment. (Evid. Code, § 1103, subds. (c)(4), (c)(5).)

Although evidence of the complaining witness's character may be relevant and admissible under Evidence Code section 1103, the trial court retains discretion to exclude the proffered evidence under Evidence Code section 352. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.) Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The trial court rejected J.C.'s proffered testimony. As we explain below, the trial court did not err. "[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 717 (*Waidla*).) We may not disturb the trial court's ruling unless the court exceeded the bounds of reason, exercising its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Defendants argue Doe's prior sexual conduct, as described by J.C., was admissible both to demonstrate her consent to

the sexual conduct underlying the charged offenses and to attack her credibility. We address these contentions in turn.

(a) Consent

Relying on *People v. Keith* (1981) 118 Cal.App.3d 973 (*Keith*), defendants argued below that the probative value of J.C.'s testimony "cannot be overstated because it is the most compelling evidence known in that it 'bolsters' the credibility of what is essentially the sole defense in this case — consent." According to defendants, "This proffered evidence [was] admissible to support the defense of *consent* which embraces the defense of reasonable belief in consent." (Original italics.) On appeal, defendants reiterate that J.C.'s testimony was crucial to their consent defense because it would demonstrate Doe's willingness to engage in sexual acts with multiple partners in the presence of onlookers and that she derived pleasure from the sexual use of inanimate objects.

Defendants' reliance on *Keith*, which did not involve rape by intoxication, is misplaced. *Keith* explains that Evidence Code section 1103 authorizes admission of evidence of prior sexual conduct between the complaining witness and a defendant for its probative value on the issue of consent, or rather the victim's lack of consent, when it is an element of the offense. (*Keith*, *supra*, 118 Cal.App.3d at p. 983.) As *People v. Giardino* (2000) 82 Cal.App.4th 454 (*Giardino*), elaborated: "A charge that the defendant accomplished the act of sexual intercourse against the will of the victim, together with evidence that places in dispute the willingness of the victim to engage in intercourse, entitles the defendant to an instruction that the act was not criminal if it was committed with the victim's actual consent." (*Id.* at p. 461.) "But," *Giardino* explained further, "if the charge is that the victim lacked the capacity to give legal consent . . . , then actual consent is irrelevant . . . ." (*Ibid.*)

In other words, where the victim lacks capacity to give legal consent, any purported consent the victim may have expressed, harbored, or intended to express is ineffective. The law prohibits a defendant from engaging in sexual intercourse where the

victim is unable to exercise reasonable judgment about participating in the act, including when the defendant knew or should have known the victim suffered a severe mental disability (§ 261, subd. (a)(1)), was too intoxicated to consent (§ 261, subd. (a)(3) [hereafter § 261(a)(3)]), or was unconscious or asleep (§ 261, subd. (a)(4)(A). (*Giardino, supra,* 82 Cal.App.4th at pp. 460-462 & 461, fn. 4.)

In the case of rape by intoxication,[5] the "issue is not whether the victim actually consented to sexual intercourse, but whether he or she was capable of exercising the degree of judgment a person must have in order to give legally cognizable consent." (*Giardino, supra,* 82 Cal.App.4th at p. 462.) *Giardino* explained that the requisite legal capacity consists of "the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences." (*Id.* at p. 466.) The court recognized: "It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim's sexual inhibitions," since "'[i]mpaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind.'" (*Ibid.*)

The victim, however, need not be intoxicated to the level of unconsciousness, or else section 261's subdivisions (a)(3) [rape by intoxication] and (a)(4)(A) [rape of an unconscious or sleeping person] would be redundant. *Giardino* also rejected the notion the victim must be "unable to even speak," finding "no indication in our decisional law that section 261(a)(3) has ever been interpreted to apply only to such severely incapacitated victims." (*Giardino, supra,* 82 Cal.App.4th at p. 463.)

Instead, the level of intoxication must "be such that the victim is incapable of exercising the judgment required to decide whether to consent to intercourse." (*Giardino, supra,* 82 Cal.App.4th at p. 464.) Put another way, "the level of intoxication and the resulting mental impairment must have been so great that the victim could no

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[5] Following *Giardino*'s example, for convenience we will discuss only rape by intoxication, but our analysis applies equally to other sexual offenses perpetrated on an intoxicated victim. (*Giardino, supra,* 82 Cal.App.4th at p. 459, fn. 2.)

longer exercise reasonable judgment concerning that issue." (*Id.* at pp. 466-467.) Accordingly, the focus is on the victim's level of intoxication (*ibid.*), and the ultimate issue — "[w]hether the victim possessed sufficient mental capacity to give legal consent despite her intoxication" — "is a question of fact for the jury." (*Id.* at p. 470.)

But as *Giardino* also observed, "section 261(a)(3) itself provides [that] the accused is guilty only if the victim's incapacitating level of intoxication 'was known, or reasonably should have been known by the accused.'" (*Giardino, supra,* 82 Cal.App.4th at p. 472.) Accordingly, a defendant's "honest and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent to sexual intercourse is a defense to rape by intoxication." (*Ibid.*)

Here, the defendants were charged solely with sexual offenses accomplished by intoxication.[6] They were not charged in the alternative with forcible rape or other sexual offenses in which the victim's lack of consent is an element of the crime. Consequently, Doe's consent — whether she harbored actual consent though she did not express it, or would have or did consent to sexual activity in other circumstances — was not the issue for the jury to decide. (*Giardino, supra,* 82 Cal.App.4th at p. 461 ["actual consent is irrelevant"]; *People v. Dancy* (2002) 102 Cal.App.4th 21, 36-37 (*Dancy*) [advance consent ineffective and prosecution need not prove victim would have withheld consent if conscious].) Rather, the pertinent questions for the jury's determination were whether Doe's intoxication rose to a level that prevented her from exercising reasonable judgment on whether to engage in intercourse or other sexual conduct at the time of the alleged offenses and, if not, whether a reasonable person should have known of her incapacity. The prior incident that J.C. proposed to testify about had little or no bearing on these issues. Nothing suggested Doe was intoxicated on

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[6] Section 261(a)(3), applies to victims who become voluntarily intoxicated (see *Giardino, supra,* 82 Cal.App.4th at p. 467); there is no requirement that the defendant or a thirdparty furnish the alcohol or procure the victim's intoxication, although that is the rule in some jurisdictions (see Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape* (2004) 40 Cal. Western L.Rev. 407, 414-415).

the occasion J.C. described in his declaration. Accordingly, nothing about the prior incident would aid the jury in determining Doe's level of intoxication two weeks later. Stated differently, nothing about the prior incident would give the jury insight into Doe's level of intoxication at the time in question, nor would it reflect on her mental capacity at different levels of intoxication, since no evidence suggested she ingested alcohol on the earlier occasion.

Resisting this conclusion, Haidl argues that when he watched Doe engage in consensual sexual conduct in the incident J.C. described in his declaration, "it gave him [Haidl] reason to believe that Doe's inaction during the videotaping [of the charged offenses] was not the result of her inability to exercise free judgment, but support for his actual and reasonable belief that Doe consented to the acts depicted in the videotape."

There are several flaws in Haidl's argument. First, the alleged incident furnished no basis from which to conclude Doe had a tendency to manifest sexual consent by "inaction," as Haidl claimed. To the contrary, assuming arguendo that the earlier incident occurred, when Doe wanted to have consensual sexual intercourse, she stated expressly and explicitly that she wanted to "'fuck'" and, when she wanted inanimate objects inserted sexually, she actively did so herself.

Second, and more fundamentally, the alleged earlier incident furnished no basis for Haidl to infer Doe's consent to sexual conduct with others meant she also would consent to similar conduct he might initiate. Haidl did not have sex with Doe in the incident J.C. observed, nor did Nachreiner, who was absent. Consequently, for Haidl and Nachreiner, the incident J.C. witnessed fell outside Evidence Code section 1103, subdivision (c)(3)'s exception to the rape shield law. (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 (*Chandler*) [in adopting rape shield provision, "the Legislature recognized that evidence of the alleged victim's consensual sexual activities with others has little relevance to whether consent was given in a particular instance"].)

J.C. noted in his declaration that he made eye contact with Haidl while engaging in sexual activities with Doe in her car. He did not explain the relevance of this detail, but it furnished no basis for Haidl to infer Doe would consent to sexual conduct

with him. Any supposition that men can consent with a wink or a nod to pass women among each other sexually is not founded in the law of consent or in logic. (See, e.g., *People v. Blackburn* (1976) 56 Cal.App.3d 685, 690-691 (*Blackburn*) [noting putative relevance of victim's past sexual conduct with others "is slight at best" and "more a creature of . . . male fantasy" than "logical inference"]; *Michigan v. Lucas* (1991) 500 U.S. 145, 157, fn. 4 (*Lucas*) (opn. of Stevens, J.) [observing courts have held "'untenable'" the premise that prior sexual conduct between the victim and one defendant constitutes evidence the victim consented to group sex with all defendants].) Because an alleged victim's prior sexual conduct with others has little or no tendency in reason to prove subsequent consent to sexual relations with a defendant, the exclusion of this evidence does not, as defendants claim, violate their federal constitutional right to present a defense. (E.g., *Blackburn*, at pp. 690-693.)

As an eyewitness who claimed he also engaged in sexual intercourse with Doe in the incident he described in his declaration, J.C. was competent to testify to the consensual nature of Doe's alleged sexual activities with Spann on that date. (*Keith*, *supra*, 118 Cal.App.3d at pp. 978-979.) But we cannot say the trial court abused its discretion by excluding the proffered testimony as to Spann and his codefendants under Evidence Code section 352.[7] As noted, J.C.'s proffer was irrelevant to Haidl's or Nachreiner's claims of reasonable belief in Doe's consent, and it would have proven a difficult task at best to craft and enforce a directive to the jury to disregard the evidence as to Haidl and Nachreiner. Defendants did not propose to aid the court in crafting such an instruction, but instead erroneously sought admission of the evidence for unlimited purposes, which would have misled the jury.

Additionally, as to Spann, the trial court admitted ample other evidence of Doe's consensual sexual activity with him: orally copulating him at the outset of their relationship, sexual intercourse twice on June 30, and again on July 4th, the same evening

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[7] In addition to basing its exclusion ruling expressly on "why we have in particular Evidence Code section 1103(c)(1)," the court also expressly relied on Evidence Code section 352.

she admitted having consensual sex with Haidl and, according to her girlfriends, also admitting have consensual intercourse in the pool with Nachreiner. Admitting additional, cumulative evidence of Doe and Spann engaging in consensual sexual intercourse would consume undue time and, more importantly, risk confusing the jury in its task to determine not consent, but whether Doe lacked the capacity to exercise reasonable judgment and whether a reasonable person should have known of her condition. As noted, the incident involving J.C. and Spann bore little relevance to the central issue of Doe's incapacitation, if any, or a reasonable person's ability to later discern her incapacitation, since no alcohol was involved.

Moreover, the incident with J.C. was, in any event, of attenuated value in establishing consent, since defendants stretched express consent given to one defendant on one occasion to an impermissible inference of implied consent extended to all defendants weeks later. The probative value of the evidence also was attenuated because Doe had only demonstrated a willingness to use inanimate objects sexually on herself, not allow others to do so. In sum, because the proposed evidence had the potential to mislead the jury into making inferences forbidden by law, and would have confused the central issue of incapacity with consent and unduly consumed time with cumulative evidence, the incident involving J.C. was inadmissible as to Haidl or Nachreiner, and the trial court did not abuse its discretion in excluding the evidence as to Spann.

(b) Credibility

Defendants also contend the trial court erred in excluding J.C.'s testimony to impeach Doe's credibility. They argue J.C.'s proffered testimony was necessary to dispel the "false image" Doe presented to the jury when she testified she would not have consented to the acts depicted in the videotape. J.C.'s testimony would similarly contradict Doe's statement to police that July 4, 2002, was the first time she had sex with more than one person on the same night and that she would never consider having sex with two people at the same time. Under Evidence Code section 782, "if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the

complaining witness under Section 780, . . . [¶] [the defendant is required to make a written] offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness." (Evid. Code, § 782, subd. (a)(1).)

Initially, Evidence Code section 782 does not require the trial court to hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient. (*People v. Rioz* (1984) 161 Cal.App.3d 905, 910.) *Blackburn, supra*, 56 Cal.App.3d 685 explained that, "[r]ead as a whole, the section empowers the trial judge first to accept the offer of proof as true. He then determines whether, if the evidence is as the defendant claims, it is relevant and if relevant whether its probative value is outweighed by the probability of undue prejudice or the undue consumption of trial time." (*Id*. at p. 691.) "Only if the judge determines both questions in favor of admissibility is the offer of proof 'sufficient.' Only if it is 'sufficient' is the trial court required to conduct the hearing to determine if the offer truly recites what the evidence will be." (*Id*. at pp. 691-692.)

In *Blackburn*, the defendant was charged with rape and kidnapping. On cross-examination at the preliminary hearing, the victim initially testified she was a virgin at the time she was raped, then later admitted she engaged in consensual sex approximately six months before the offense. Pursuant to Evidence Code section 782, the defendant filed an offer of proof that after the offense, the victim, a minor, had lived in a motel with a 40-year-old man. The victim denied and then admitted a sexual relationship with the man. Counsel's affidavit in support of the offer of proof in *Blackburn* pointed out the inconsistencies in the victim's testimony and pretrial statements, arguing "'the sexual proclivity of the complaining witness and her lack of truth and veracity are clearly in question.'" (*Blackburn, supra*, 56 Cal.App.3d at p. 689.) But *Blackburn* upheld the trial court's finding the defendant's offer of proof was insufficient to entitle him to a hearing.

A later decision observed that "California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history."

(*Chandler*, *supra*, 56 Cal.App.4th at p. 708.) In other words, to prevent the exception from swallowing the rule, "[t]he credibility exception has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution." (*Ibid.*)

Here, the trial court concluded J.C.'s proffer did not warrant an in-camera hearing, ruling, "I am finding that that is insufficient for the court to take that next step." Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling on the admissibility of sexual conduct evidence for impeachment purposes. (*Chandler*, *supra*, 56 Cal.App.4th at p. 711.)

We discern no error in the trial court's exclusion of J.C.'s proffer to impeach Doe. The ruling did not prevent defendants from confronting Doe with her promiscuity or from dispelling any false image in her claim she would not have sex with multiple partners, given the jury heard she did so serially with all three defendants. And while Doe testified she would not have consented to the acts depicted in the video, J.C.'s testimony could not have established valid advance consent. (See *Dancy*, *supra*, 102 Cal.App.4th at p. 37 ["neither a woman's actual 'advance consent' nor a man's belief in 'advance consent'" is a defense where the woman later lacks capacity to consent].) Nor is it a defense to establish the victim would have consented if she were not incapacitated. (See *id.* at p. 35, original italics [prosecution need not prove "what the unconscious victim *would have done* if conscious"].) Accordingly, J.C.'s testimony had attenuated relevance at best, given the issue for the jury to resolve was not her consent, but rather her incapacitation. (See *Giardino*, *supra*, 82 Cal.App.4th at p. 471 ["the actual consent of the victim is not a defense to a charge of rape by intoxication, a belief in the existence of such actual consent is irrelevant"].) As the trial court observed, the videotape rather than Doe's credibility was the principal evidence concerning her incapacitation. In any event, under Evidence Code section 352, the trial court reasonably could conclude the risks of misleading the jury, confusing the issues, and wasting time weighed in favor of excluding J.C.'s testimony, given its minimal additional probity in impeaching Doe.

Moreover, defendants had ample opportunity to impeach Doe's credibility. The Attorney General contends the trial court properly exercised its discretion to exclude J.C.'s proposed testimony because this line of attack on Doe's credibility added little given the copious evidence of her dishonesty. We agree. The court was aware the same witnesses who testified to Doe's reputation for dishonesty in the first trial were scheduled to testify in this trial, making impeachment of Doe with J.C.'s testimony cumulative. The court recited examples of Doe's dishonesty generally and her lack of credibility concerning sexual matters specifically, including: "There is evidence as to Jane Doe lying to her parents on the evening of the 5th and the morning of the 6th. [¶] . . . [¶] There has been evidence presented that Jane Doe engaged in sex with some of the defendants without having any prior relationship with them, or knowing them for an extensive period of time. [¶] . . . [¶] Those are the main items the court has identified as to why it should implement the provisions of section 352 of the Evidence Code, as well as careful consideration of why we have Evidence Code section 782, and why we have in particular Evidence Code section 1103(c)(1)." On this record and given the trial court's wide leeway on evidentiary matters, we cannot say the trial court abused its discretion in excluding J.C.'s testimony without an evidentiary hearing.

Defendants' complaint that the trial court failed to conduct a balancing test pursuant to Evidence Code section 352 when it excluded J.C.'s testimony is also without merit. The Supreme Court has repeatedly reaffirmed that "a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.) As detailed above, the record more than adequately reflects that the trial court understood its responsibilities under Evidence Code section 352 when it excluded J.C.'s proffered testimony on the basis that it was cumulative and, more importantly, would have misled the jury.

Nor was there any constitutional violation. The trial court's ruling did not prevent defendants from presenting their defense, which was based largely on Doe's

promiscuity, on which the jury heard voluminous testimony. And application of the ordinary rules of evidence, including rape shield laws (*Lucas, supra*, 500 U.S. at p. 151) to exclude J.C.'s testimony, does not infringe a defendant's federal constitutional rights (*People v. Boyette* (2002) 29 Cal.4th 381, 427). Nor would the evidence have presented a significantly different picture of Doe's credibility, as required for a confrontation violation. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) Consequently, we find defendants' challenge to the exclusion of J.C.'s testimony to be without merit.

2. Doe's Methamphetamine Possession Arrest in San Bernardino County

Defendants contend the trial court erred in excluding evidence of Doe's involvement with methamphetamine to impeach her credibility. We evaluate the trial court's ruling on the admissibility of impeachment evidence for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) The court's latitude under Evidence Code section 352 is broad. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296 (*Wheeler*).) Here, we cannot say the trial court's ruling "'falls outside the bounds of reason.'" (*People v. Williams* (1998) 17 Cal.4th 148, 162.) Consequently, we may not substitute our judgment for the trial court's exercise of its discretion. (*People v. Sword* (1994) 29 Cal.App.4th 614, 626.)

In between the first and second trials, Doe and her boyfriend, J.T., were arrested in San Bernardino County after police found a small pouch of methamphetamine next to J.T. on the driver's seat of the car, a straw containing methamphetamine residue and two grams of methamphetamine in Doe's purse that she claimed were for personal use, and other drug paraphernalia in the vehicle. The prosecutor filed a felony complaint alleging possession of methamphetamine for sale, but reduced the charge to misdemeanor simple possession with Doe's and J.T.'s participation in a diversion program. (§ 1000.)

A misdemeanor conviction constitutes inadmissible hearsay but, at the trial court's discretion, "evidence of the underlying *conduct* may be admissible" to impeach the witness (*People v. Chatman* (2006) 38 Cal.4th 344, 373, original italics) since "[m]isconduct involving moral turpitude may suggest a willingness to lie" (*Wheeler*,

supra, 4 Cal.4th at p. 295). Simple possession of illegal narcotics is not a crime of moral turpitude, but possession for sale is. (*People v. Castro* (1985) 38 Cal.3d 301, 317.) The moral taint implicit in possession for sale, however, is *not* dishonesty (*ibid.*), but rather a general readiness to do evil, which is less indicative of a witness's veracity than crimes of dishonesty (*People v. Thornton* (1992) 3 Cal.App.4th 419, 422). The strength of the inference that misconduct implicates dishonesty varies depending on the circumstances of the misconduct, and thus may entail exploring those circumstances. "Obviously, however," there comes a point of diminishing returns: because the misconduct "is only admissible if it evinces moral turpitude and such turpitude can only be established through extrinsic evidence, confusion of issues becomes inevitable and unfair surprise [in dredging the witness's past] more than probable." (*Castro*, at p. 317 [holding felony convictions are not per se admissible, but only if their least adjudicated elements involve moral turpitude].)

Here, the trial court reasonably could conclude the probative value of this evidence was outweighed by the undue consumption of time and potential for confusing the issues. Contrary to defendants' claim, this evidence did not present a straightforward or speedy means of impeachment. Rather, it involved a detour into exploring Doe's San Bernardino drug offense to determine whether her conduct there amounted to simple possession, consistent with her diversion conviction, and therefore had no bearing on her credibility, or instead amounted to sales activity. Even assuming the evidence implicated Doe in sales activity, the matter would not end there because the degree of moral turpitude in such activity — and hence relevance to Doe's veracity — would depend on further exploring the circumstances of Doe's involvement. This would require the court to devote more time to exploring these issues, including, as the prosecutor noted, her relationship with her boyfriend and any dependence on him, their relative culpability, the extent of her involvement in any of his drug activities (she claimed she only ferried him around), her claim she had quit the drug trade herself, and her claim she became involved in methamphetamine because of her ordeal in the charged offenses.

Defendants wanted to explore Doe's admission to the arresting officer that she used to sell methamphetamine, and they interpreted her statement to the officer that she had done so "*while in high school*" to mean she dealt drugs to minors on campus. (Original italics.) These statements touched on matters other than Doe's arrest and therefore would have taken the inquiry beyond the San Bernardino incident. Because there was no evidence besides Doe's statements of her involvement in drug sales, defendants offered to hunt for corroborating evidence in Doe's high school disciplinary records. But her statement about selling drugs while in high school was consistent with Doe, who was 18 years old at the time of her arrest, having sold drugs while of school age, albeit not on campus, and in any event, illustrates the danger the trial court sought to avoid of traipsing farther and farther afield into collateral evidentiary presentations, rebuttal, and surrebuttal. (See Evid. Code, § 352; *Wheeler*, *supra*, 4 Cal.4th at p. 296 ["The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues"].)

The trial court could reasonably conclude that, while witness credibility always has some relevance, the videotape differentiated this case from the "he said, she said" battle of a typical rape prosecution. As the court observed, "the young men that are here on trial are on trial not because of Jane Doe's testimony as to sexual conduct on the part of these defendants," which she claimed not to recall. "The reason they are here is the[] . . . video . . . ." The crucial video evidence distinguishes this case from the pure credibility contests in the cases on which defendants rely. (*Davis v. Alaska* (1974) 415 U.S. 308, 317; *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091.)

The videotape's prominence stands out given the dispositive issue for the jury's resolution was *not* consent (*Giardino*, *supra*, 82 Cal.App.4th at p. 461 ["actual consent is irrelevant"]), therefore diminishing the importance of Doe's credibility. Instead, the dispositive issue was Doe's ability to exercise reasonable judgment at the time of the offenses, elevating the importance of the videotape. An objective rather than subjective standard governed this inquiry because a defendant commits a sexual offense by intoxication only if a reasonable person should have known of the victim's incapacity

to exercise judgment (*id.* at pp. 471-472; see, e.g., § 261(a)(3)), and the videotape enabled the jury to make a virtual first-hand assessment of the objective indicia of incapacity required for conviction.

Moreover, as the trial court observed, defendants had ample opportunity to impeach Doe's credibility and thoroughly exercised their right to do so. By the time the court conducted the hearing on Doe's methamphetamine arrest, the jury already had heard from five defense witnesses who testified Doe was a liar and had a reputation for dishonesty. The jury also would hear testimony from additional witnesses that Doe provided false information to police, an investigator, and medical personnel. In addition to Doe's admissions of dishonesty on direct and cross-examination, and the contradictions in her testimony brought to light by the defense, virtually every witness who had met Doe testified to her dishonesty. We count no less than 50 instances in which the defense ably impeached Doe's credibility or testimony in this case. Doe's own parents testified to her specific lies and her general character to distort the truth. Had the mix been different, the probative value of impeaching Doe with the circumstances of her San Bernardino arrest probably would have outweighed the trial court's concerns regarding undue consumption of time, confusion of issues, and pursuit of collateral matters.

But this decision rests "within the discretion of the trial court to exclude impeachment evidence as cumulative when there is already evidence of the witness's lack of credibility." (*People v. Burgener* (1986) 41 Cal.3d 505, 525, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) We cannot say the trial court's Evidence Code section 352 ruling was arbitrary or capricious and, given the mountain of evidence and near-unanimous testimony impeaching Doe's truthfulness, we cannot say the trial court's methamphetamine ruling violated their federal constitutional rights to present a defense or confront witnesses. Simply put, we do not discern that "'"the prohibited cross-examination would have produced a significantly different impression of [Doe's] credibility" . . . .'" (*People v. Brown* (2003) 31 Cal.4th 518, 545-546 (*Brown*).)

Defendants assert the record fails to show the trial court engaged in the balancing test required under Evidence Code section 352 to exclude the evidence as more prejudicial than probative. We disagree. The Supreme Court has repeatedly reaffirmed that "when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams, supra*, 16 Cal.4th at p. 213; *People v. Padilla* (1995) 11 Cal.4th 891, 924 (*Padilla*), overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Specifically, defendants argue the record requires reversal because, "[i]n refusing to admit Deputy Castillo's proffered testimony" concerning Doe's San Bernardino arrest, "the court did not refer to section 352, nor were its stated reasons premised on a weighing process." To the contrary, a few minutes after excluding the San Bernardino drug evidence, including Castillo's testimony, the court clarified it had done so pursuant to Evidence Code section 352. And as discussed, the trial court's reference to the videotape in its stated reasons for exclusion reflected the diminished importance of Doe's credibility compared to a typical rape prosecution and the "he said vs. she said" cases on which defendants relied.

Considering in tandem the trial court's reference to the diminished probative value of Doe's credibility, given the videotape, and the parties' trial briefs stressing the court's duty to weigh the probative value and prejudicial effect of admitting the evidence, we conclude the trial court performed its duty under Evidence Code section 352. (See *Padilla, supra,* 11 Cal.4th at p. 924 [parties' briefs and counsel's invocation of "'extreme prejudice'" at hearing sufficed]; Evid. Code, § 664.) Additionally, the trial court referred to its prior Evidence Code section 352 ruling excluding J.C.'s proffered testimony, where the court explained at length the minimal probative value of J.C.'s testimony, the probability of misleading the jury, and that the evidence also was cumulative. Consequently, "'[t]he record as a whole shows the court was well aware of, and consistently performed, its duty . . . to balance the probative value

of evidence against any prejudicial effect.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188 (*Riel*); see also *People v. Prince* (2007) 40 Cal.4th 1179, 1237 ["the necessary showing can be inferred from the record despite the absence of an express statement by the trial court"].) Accordingly, there is no basis to overturn the trial court's ruling.

Defendants also argue the trial court erred by barring them from exploring whether Doe and her boyfriend received favorable treatment from San Bernardino authorities because defendants' retrial loomed on the horizon. Defendants, however, presented no evidence that San Bernardino provided unusually lenient treatment in allowing Doe and her boyfriend to enter a drug diversion program, nor any shred or scintilla of other evidence to support this speculative attack. Indeed, the prosecutor denied he had any contact with or directly or indirectly asserted any influence over his San Bernardino counterpart. Defendants argued that even if Doe merely perceived she may have received favorable treatment, it could bias her testimony in favor of the prosecution but, as the Attorney General points out, Doe did not vary for the second trial her testimony about whether she consented to or could recall the videotaped incidents. At the first trial, before her San Bernardino arrest or prosecution, Doe had no incentive "to seek a benefit for a case that did not yet exist." (*Brown, supra*, 31 Cal.4th at p. 545.) Accordingly, because her testimony in the retrial varied little from the first trial, evidence of the San Bernardino dispositions and Doe's perception of them had minimal, if any, probative value. Consequently, the trial court did not abuse its discretion by viewing this inquiry as a speculative and therefore collateral matter.

3. Hiring Counsel

Defendants contend the trial court erred in prohibiting them from impeaching Doe's denial during cross-examination that she had hired an attorney "to sue the Haidl family for money." Defendants argue the trial court abused its discretion under Evidence Code section 352 when it found the undue consumption of time and confusion of issues involved in presenting the matter outweighed the slight probative value of the evidence. Defendants fail to show the court abused its discretion.

During the first trial, Haidl and Spann moved to admit evidence of Doe's bias against defendants by showing she and her parents proposed a $2.5 million settlement of Doe's claims against the Haidl family. The prosecutor disputed the accuracy and probity of the claim on several grounds we discuss below. Haidl's counsel estimated it would take one week to present the evidence, but the prosecutor estimated it would take longer. The trial court excluded the evidence under Evidence Code section 352, explaining that the dispute over who made the initial offer, the settlement discussions, prospective civil suits, and other peripheral issues were of limited probative value, and would confuse the issues and absorb undue time.

At the second trial, Haidl filed another pretrial motion to impeach Doe's credibility with evidence she and her parents offered a $2.5 million settlement agreement. The trial court again excluded any reference to the civil proceedings under Evidence Code section 352. The court incorporated by reference its comments and observations in the first trial, again emphasizing the complexities and undue consumption of time in allowing the parties to delve into the issues and circumstances surrounding the civil litigation.

Despite the trial court's ruling, one of Haidl's attorneys, Joseph Cavallo, cross-examined Doe at the second trial as follows:

"Q Ms. Doe, isn't it true that you hired an attorney to sue the Haidl family for money?

"A No.

"Q Did you hire an attorney by the name of Sheldon Lodmer to —

"A Yes.

"Q Did you hire him to sue the Haidl family for money?

"A No.

"Q Did you hire an attorney by the name of Adam Stull to sue the Haidl family for money?

"A No."

Out of the presence of the jury, Spann's attorney, Peter Morreale, acknowledged he was aware of "the court's previous ruling . . . not to go into the civil aspect of this case . . . ." Nonetheless, he filed a copy of the retainer agreement between Doe and her civil attorney with the court, explaining it constituted "direct impeachment of financial gain for the witness in the case, and I just want to make sure the record is clear that I, on behalf of Mr. Spann, have requested or am requesting the ability to cross-examine her on those particular issues, financial gain." When the trial court responded by repeating its earlier Evidence Code section 352 ruling prohibiting evidence exploring Doe's financial bias toward defendants, particularly Haidl, counsel clarified that defendants sought only to directly impeach Doe's denial she hired counsel, explaining, "She was asked, did you hire or did you retain Adam Stahl [*sic*] to sue Greg Haidl, and she said, no. The retainer agreement said she did."

The trial court rejected defendants' request, explaining, "[T]hat question should not have been asked of Jane Doe. That's in direct contradiction to the court's ruling. I don't even understand why that question was put to Jane Doe. I am more inclined to hold an attorney in contempt for doing that, I am more inclined to tell the jury that the attorney was told he couldn't do that and still did it . . . ."

Defendants do not challenge the trial court's ruling excluding evidence of Doe's financial bias in testifying against defendants based on settlement negotiations between Haidl, Doe, and her parents. Instead, defendants complain the trial court erred in refusing to allow them to impeach Doe with evidence she lied about hiring counsel to sue the Haidl family. According to defendants, they sought to impeach Doe's testimony that "she had not hired Adam Stull" when "[i]n fact, on November 11, 2004, between the two trials, Doe signed a contingency retainer agreement . . . for this very incident," therefore, "Her testimony to the contrary was flatly false." Defendants contend the trial court abused its discretion in prohibiting the impeachment because the evidence was probative of Doe's untruthfulness and, contrary to the trial court's assertion, would not have involved undue consumption of time. We do not find the argument persuasive.

Defendants' claim it would take only a few questions to impeach Doe with the retainer agreement implicitly assumes either the prosecution would not respond or the court would prohibit evidence explaining why the Does hired counsel. Neither assumption is warranted. It is clear from the pretrial hearing on this issue that the trial court would have permitted the prosecution to respond to Doe's impeachment by calling witnesses to explain it was Haidl's lawyer who first approached Doe's family and insisted that any settlement include an end to the pending criminal case. These witnesses would testify the Does hired counsel to represent them during negotiations initiated by Haidl, thereby undermining defendants' claim Doe hired an attorney only "to sue the Haidl family for money." The prosecution also would introduce evidence Doe never approached the district attorney about settling the case, and instead willingly testified against the defendants. This evidence, in turn, would prompt defendants to counter with evidence contesting the prosecution's evidence. The result would be a protracted hearing with both sides offering their versions of the circumstances surrounding the settlement discussions, precisely the kind of thicket the trial court sought to avoid in prohibiting the parties from broaching the issue.

Haidl's counsel, however, either did not understand or chose to ignore the court's order not to raise the issue. Displaying the chutzpah of a thief who demands a reward for returning the wallet he stole, counsel asserted the right to further impeachment on a subject he should never have raised. We concur with the trial court's apt observation that it would be more inclined to hold the lawyer in contempt than reward such brazen conduct by permitting that lawyer to exploit his violation of the court's earlier ruling. Based on the undue consumption of time and confusion of issues necessarily entailed in litigating the matter, we discern no error in the court's refusal to allow further cross-examination on the issue.

3. Past Accusation of Rape

Defendants also complain the trial court abused its discretion by excluding evidence Doe had made a prior false accusation of rape. Defendants forfeited the claim,

however, by failing to preserve it for review. On the merits, moreover, defendants failed their initial burden to present evidence to substantiate the claim against Doe.

In the first trial, defendants filed a motion seeking the trial court's permission to impeach Doe because she allegedly made a prior false accusation of rape. Aside from a general statement they were "prepared to present evidence" on the issue, defendants offered no declaration or other evidence to support their claim. Nor did defendants make an offer of proof at the hearing on the motion. The trial court denied the motion under Evidence Code section 352.

In the second trial, defendants filed a request for the trial court to reconsider or renew, as applicable, rulings it made in the first trial. At the hearing, Haidl's counsel stated he had intended to delete for reconsideration the motion involving Doe's past accusation of rape. Consequently, he requested the court take the motion off-calendar. To clarify, the prosecutor asked the trial court to verify that Evidence Code section 352 evidentiary rulings in the first trial did not apply in the second trial; accordingly, the prior rape allegation would not be excluded "simply because it was excluded in the last trial."

The trial court responded that "anything that was ruled on by this court in trial number one, and the court did so under the provisions of [Evidence Code section] 352, . . . each attorney for each defendant understands they are entitled to — they are entitled to request reconsideration if they deem it to be in the[] interest of their respective clients." The trial court then confirmed it excluded evidence of Doe's alleged false accusation based on Evidence Code section 352, causing the prosecutor to observe "the defense would have to renew that motion."

Defendants in the second trial never renewed their motion to impeach Doe with evidence she made a prior false accusation of rape. Nevertheless, they now complain the trial court erred in denying the motion they lodged in the first trial. Failure to renew the motion constituted a forfeiture of the issue. "'While it may not be necessary to renew an objection already overruled in the same trial [citation], absent a ruling or stipulation that objections and rulings will be deemed renewed and made in a later trial

[citation], the failure to object bars consideration of the issue on appeal.' [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1306.)

Defendants' argument is unavailing even if they had renewed the motion. A prior accusation of rape is relevant only if the accusation is shown to be false, a burden borne by the proponent of the evidence. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097.) Defendants' motion included no facts about the accusation, failed to identify prospective evidence or witnesses, and never explained or described the evidence they would have offered to support the allegation. Consequently, the trial court did not abuse its discretion in rejecting defendants' ill-conceived motion.

B. Instructional Error

1. Moral Character or Consequences

Defendants contend the trial court's instructions misled the jury on the level of a victim's intoxication required for conviction of sexual offenses committed by intoxication. The court instructed the jury that to determine whether the alleged victim had the legal capacity to consent it must evaluate whether she could exercise reasonable judgment. Defendants complain the trial court should not have defined reasonable judgment to include the ability to evaluate the "moral character" or "moral consequences" of conduct. Defendants argue a level of intoxication that prevents a victim from evaluating the moral character or consequences of her conduct "is insufficient." Rather, according to defendants, "Doe must have been rendered unable to recognize the very nature of her actions — not merely their moral character." Defendants are mistaken.

The trial court instructed the jury with CALJIC No. 1.23.2, drawn from *Giardino*, as follows: "In the crime charged in Counts 1-8 an essential element of the crime is that the alleged victim was prevented from resisting the act by an intoxicating substance. 'Prevented from resisting' means that as a result of an intoxicating substance, the alleged victim lacked the legal capacity to give 'consent.' Legal capacity is the ability to exercise reasonable judgment, that is, to understand and weigh not only the

physical nature of the act, but also its *moral and probable consequences*." (Italics added.) In a separate instruction defining "legal capacity," the trial court used *Giardino*'s definition of the term verbatim: "Legal capacity is the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its *moral character* and probable consequences." (*Giardino, supra*, 82 Cal.App.4th at p. 466, italics added.)

The trial court did not err. Defendants' argument that the victim must be so grossly intoxicated as to be ignorant of "the very nature of her actions" is similar to an argument *Giardino* rejected. *Giardino* concluded the victim need not be "intoxicated to a degree that rendered" her "unable to even speak," noting "[t]he line between that extreme level of intoxication and absolute unconsciousness is very thin" and that nothing "in our decisional law" indicated the proscription against rape of intoxicated persons "has ever been interpreted to apply only to such severely incapacitated victims." (*Giardino, supra*, 82 Cal.App.4th at pp. 462-463.) Instead, *Giardino* drew its definition of legal capacity from cases holding "legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences" (*People v. Griffin* (1897) 117 Cal. 583, 585, overruled on another point in *People v. Hernandez* (1964) 61 Cal.2d 529, 536) and that adequate consent "assumes a capacity in the person consenting to understand and appreciate the nature of the act committed, its immoral character and the probable or natural consequences which may attend it" (*People v. Peery* (1914) 26 Cal.App. 143, 145). (See *Giardino*, at p. 466.)

Defendants challenge the use of the term "moral" as an "antiquated and disfavored term in the criminal law . . . ." But while the term "moral certainty" is, as defendants note, inappropriate to convey to modern jurors the necessity of proof beyond a reasonable doubt (*Victor v. Nebraska* (1994) 511 U.S. 1, 7; *Cage v. Louisiana* (1990) 498 U.S. 39, 41, disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4), the evaluation of "moral consequences" and the "moral character" of an act is apt here. Use of the term "moral" adequately conveys that, contrary to defendants' argument, legal capacity involves more than a grasp of the physical nature of an act.

Rather, the person deciding whether to engage in particular conduct must be *capable* of grasping the act may have meaningful social or other consequences and thus has a moral dimension, apart from the person's own moral standards or eventual decision in the matter. Accordingly, we reject defendants' argument that use of the word "moral" lowered the threshold of the victim's required intoxication; rather, it merely followed ample precedent culminating in *Giardino*'s holding. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1528 [*Giardino* standard accurately sets forth the elements necessary to establish a conviction for sexual offenses by intoxication].)

2. The Victim's Prior Sexual Conduct with the Defendants

Defendants contend the trial court erred by failing to instruct the jury sua sponte with CALJIC No. 10.61.1, which provides that "[e]vidence has been introduced" to show the defendant and victim engaged in prior consensual intercourse and that if the jury believes such evidence, they "should consider it only for the limited purpose of tending to show that [the alleged victim] consented to the act of intercourse charged in this case, or that the defendant had a good faith reasonable belief that [she] consented to the act of sexual intercourse." The instruction goes on to admonish the jury that they cannot consider the evidence for any other purpose. This instruction derives from section 1127d, which sets forth the same limitations on the jury's use of evidence of prior consensual sex, often introduced in rape cases to prove a *Mayberry* defense. (See *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*) [reasonable, good faith mistake of fact regarding alleged victim's consent constitutes valid defense to rape charge]. The jury acquitted defendants of rape by intoxication, but defendants contend a *Mayberry* instruction was still necessary to inform the jury of their defense to the other charged sexual offenses.

The *Mayberry* defense, however, does not apply in intoxication cases because a reasonable belief the victim actually consented — or earlier consented or would have consented if not incapacitated (*Dancy, supra,* 102 Cal.App.4th at pp. 35-37) — is not a defense to the charge she was too intoxicated to give effective consent. (See

Giardino, *supra*, 82 Cal.App.4th at p. 461 ["actual consent is irrelevant, and the jury instructions need not touch on that issue"].) Instead, as discussed *ante*, the issue is the victim's level of intoxication and whether the defendant knew or should have known it rendered the victim incapable of exercising reasonable judgment. (*Giardino*, at pp. 466, 472.) Giving a *Mayberry* instruction here would have confused the issues and misled the jury that actual or implied consent constituted a defense. Consequently, the trial court had no duty to instruct the jury with CALJIC No. 10.61.1.

Defendants also contend the trial court sua sponte should have given a modified version of CALJIC No. 10.61.1 stating that Doe's prior consensual sexual activities with the defendants "may be considered as it relates to the questions of whether Doe legally consented to the acts of penetration charged in this case, and whether the defendants had a good faith reasonable belief that Doe legally consented to the charged acts." The proposed instruction is faulty in that it provides no guidance on *how*, or to what effect, the parties' prior consensual sex acts "may be considered . . . ." Moreover, the fundamental error noted with using with CALJIC No. 10.61.1 in the present context remains the same. Again, defendants' proposal would have misled the jury that the issue was whether the victim consented, not whether she had the capacity to consent. True, the requirement that a defendant knew or should have known of the victim's incapacity affords him a valid defense (*Giardino, supra*, 82 Cal.App.4th at p. 472), but the trial court fully instructed the jury on this defense.[8]

The trial court properly instructed the jury concerning prior consensual sexual activity between the parties. The court instructed the jury that "[a] person who

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8 The trial court instructed the jury: "A defendant's actual good faith and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent to sexual intercourse, oral copulation or sexual penetration with a foreign object is a defense. The accused is only criminally liable if the victim's incapacitating level of intoxication was known, or reasonably should have been known, by the accused. [¶] However, if you conclude beyond a reasonable doubt that a defendant knew or should have known that the alleged victim was so intoxicated that she was prevented from resisting, it is not a defense that the defendant believed that she would have consented if she was not so intoxicated."

initially consents and participates in a sexual act with the accused has the right to decide whether or not to continue participation in the sexual act *or any subsequent sexual act*." (Italics added.) (See *Dancy*, *supra*, 102 Cal.App.4th at pp. 36-37 [earlier consent nonbinding and may be withdrawn].) The trial court also correctly instructed the jury that "[i]f the alleged victim becomes too intoxicated (does not have the legal capacity to consent) and the accused knows or reasonably should have known that the alleged victim is too intoxicated, at the time of the alleged sexual act, then the prior consent is not a defense to the charge of unlawful sexual act by intoxication." (See *Giardino*, *supra*, 82 Cal.App.4th at p. 459 [rejecting notion consent is a defense to rape by intoxication].) These instructions were not, as defendants now imply, unbalanced, but rather correct statements of law. Thus, the trial court properly gave these instructions concerning prior consent rather than the ones defendants now insist were necessary. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1275 [trial court "may give only such instructions as are correct statements of the law"], overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Because the trial court properly instructed the jury concerning the use of evidence of Doe's prior sexual conduct with the defendants, and because giving CALJIC No. 10.61.1 or the variation defendants now propose would have misled the jury, there is no merit to their contention those instructions should have been given.

C. Deliberations

1. Spann's Right to Counsel

Spann contends the trial court denied him his right to counsel when it responded to jury questions without his attorney present. As we explain, however, the record reflects that Spann agreed his codefendants' attorneys could specially appear for Spann's attorney, who had other court appearances in Riverside.

Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the

presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." The Supreme Court has construed section 1138 "not only to require that the defendant and counsel be given notice of the jury's inquiry, but also to afford the defense the right, once so notified, to be present and to have an opportunity to have meaningful input into the court's response to the jury's inquiry." (*People v. Garcia* (2005) 36 Cal.4th 777, 802.)

The federal and state Constitutions also include a right to counsel of choice for nonindigent defendants (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146; *People v. Jones* (2004) 33 Cal.4th 234, 244), and the right to counsel extends to all critical phases of criminal proceedings (*United States v. Wade* (1967) 388 U.S. 218, 224; *People v. Siripongs* (1988) 45 Cal.3d 548, 564). The constitutional right to counsel may be implicated when jurors ask questions during deliberations. (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413; *People v. Rubalcava* (1988) 200 Cal.App.3d 295, 299.)

Spann does not dispute he agreed another attorney would specially appear in the event of his attorney's absence during deliberations, but he argues he limited the scope of substitute representation to the readback of testimony, not responding to jury questions. (*People v. Neufer* (1994) 30 Cal.App.4th 244, 251, original italics ["defense counsel's consent to having testimony read back in his absence did *not* embrace having jury questions — not yet asked or formulated — answered in his absence"].) The record as a whole, however, supports the trial court's implicit, contrary conclusion.

After the jury left the courtroom to deliberate, the trial court explained its normal procedure for attorney appearances and response times during deliberations. The court stated that it did not want to "wait an hour for the 91 [freeway] to let [them] through" for appearances made in Riverside and explained, "I normally have the attorneys on a 30-minute standby" and "[t]hat's not going to work for Riverside." In response, Spann's attorney, Peter Morreale, said, "I will be out in court in Riverside. I have a number of appearances to make. I can be on relatively short call. Mr. Scalisi, [Haidl's attorney,] said he would appear for me if I couldn't make it." The trial court asked, "Is that all right with your client?" Morreale inquired, "Mr. Spann, is that okay, if

Mr. Scalisi appears for me in the event there is a question for the jury for a readback?" Spann replied, "Yes, it is."

The foregoing exchange demonstrates Morreale alerted the court that Scalisi would specially appear for him without qualification "if I couldn't make it." The Attorney General contends the exchange further reflects that when Morreale explained to Spann the representation would cover "a question for the jury for a readback," it appeared he did so to illustrate a potential scenario, but not an exclusive scenario. Indeed, the trial court's comments make clear it would not have accepted a substitute appearance solely to answer the jury's request to have testimony read back to them. Further events support the Attorney General's interpretation of Morreale's colloquy with Spann.

Late that afternoon the jury posed a question regarding the meaning of specific intent in one of the instructions. The court addressed the question the next morning, a Friday, with "counsel and each defendant" present. The caption of the reporter's transcript states Scalisi made a "special appearance" for Spann, whereas the minute order has Nachreiner's attorney, John D. Barnett making "a special appearance for Peter J. Morreale, Retained Attorney." The minute order also notes Spann "waived his counsels [*sic*] presence for this proceeding." The court and counsel discussed the jury's question, formulated a response, and both attorneys agreed with the proposed response.

When the jury asked another question about specific intent Monday morning, Scalisi expressly made a special appearance for Morreale, who was again absent. Barnett and Scalisi answered affirmatively when the court asked if it were "satisfactory with counsel for defendants that . . . we have this discussion on the jury's request . . . without the defendants being present?" After "informal discussions in chambers," the court and counsel returned to the courtroom and counsel lodged their objections to the court's proposed response.

About 25 minutes after the court responded in writing to the jury's question, the parties met in open court to resolve issues about possible verdicts and video equipment. At this time, Spann was present in the courtroom with counsel Morreale

when the court invited counsel to put on the record any issue he wanted to raise. In response, Morreale said, "I want to make sure the record is clear, since I was not here this morning. *Mr. Scalisi did appear on my behalf with the permission of my client.* I want the record to be clear I object to the response to the jury question." (Italics added.) Scalisi responded, "I think I did object for everyone this morning." The trial court asked if counsel wanted to discuss or make a record of anything else, but the attorneys, including Morreale, declined. That afternoon the jury had two more queries, Scalisi again specially appeared "for Morreale for Keith Spann," and counsel and the court met in chambers without defendants present. Counsel agreed to the court's proposed responses.

With his affirmation that Scalisi "did appear on my behalf with the permission of my client," Morreale ratified the trial court's apparent understanding that Scalisi's special appearances extended to answering juror questions and not just the read back of testimony. The court had notified all counsel, including Morreale, that the jury had posed a question, and the court could reasonably conclude Spann and Morreale, in authorizing Scalisi to appear, intended him to address the question. This conclusion is supported by Scalisi's further clarification that, as to the court's response to the jury's question, he understood he was "object[ing] for everyone this morning." The arrangement made the previous Friday in response to the court's demand the attorneys remain close by, and not in Riverside, further supports the conclusion Spann and Morreale authorized Scalisi to address all issues raised in Morreale's absence. Notably, Spann expressly waived Morreale's presence to answer the jury's questions on Friday, suggesting he understood substitute counsel would represent him in such matters if Morreale were absent. From all the foregoing, the court could infer Morreale prudently made arrangements "with the permission of my client" for special appearances by codefendants' counsel — either Scalisi or Barnett on Friday and Scalisi on both occasions on Monday — and that the arrangement extended to answering jury questions.

Invoking *Johnson v. Zerbst* (1938) 304 U.S. 458, 464, Spann argues waiver of the right to counsel must be voluntary and intelligent, reflecting "an intentional

relinquishment or abandonment of a known right or privilege." Spann, however, did not waive his right to counsel but instead agreed to the special appearance of counsel on his behalf. Viewing the court's and the parties' practice as a whole in responding to jury questions, including Spann's express waiver of Morreale's presence on Friday and his and Morreale's express ratification of Scalisi's special appearance on Monday, we conclude the court did not violate Spann's right to counsel of his choice. Rather, Spann agreed other counsel could make special appearances for his attorney, which included responding to jury questions. There was no error or constitutional violation.

2. Defendants' Right to Be Present

Spann complains for the first time on appeal that the trial court violated his right to be present at critical stages of the trial (*Illinois v. Allen* (1970) 397 U.S. 337, 338; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745) by not including him, as described above, in Monday's in-chambers discussions of the jury's questions. Haidl and Nachreiner join in Spann's argument because they also were absent. "An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial . . . ." (*Waidla*, *supra*, 22 Cal.4th at p. 741.) We conclude defendants forfeited the contention by failing to raise it below. (Evid. Code, § 353, *People v. Partida* (2005) 37 Cal.4th 428, 436 [constitutional claim may be forfeited by absence of specific objection]; cf. *Rushen v. Spain* (1983) 464 U.S. 114, 117-120 [defendant's absence is not structural error]; accord, *People v. Hogan* (1982) 31 Cal.3d 815, 850, disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

In any event, even overlooking defendants' forfeiture, Spann's argument fails on the merits for several reasons. First, defendants' presence was not required in chambers where the court addressed the strictly legal and administrative questions posed by the jury's questions.[9] (*Riel*, *supra*, 22 Cal.4th at pp. 1195-1196; *Waidla*, *supra*,

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[9] The jury asked three questions that the court addressed with the attorneys without defendants being present. Monday morning, the jury asked, "Does 'specific intent' require that the Defendants had knowledge that their actions were criminal or illegal?" And that afternoon, the jury asked, "Do you want to see the verdict book as we

22 Cal.4th at pp. 741-743; *People v. Horton II* (1995) 11 Cal.4th 1068, 1121-1122; see *People v. Kelly* (2007) 42 Cal.4th 763, 781-782 [counsel's presence sufficient]; accord, *United States v. Rosales-Rodriguez* (9th Cir. 2003) 289 F.3d 1106, 1110.)

Second, Scalisi, who specially appeared for Spann on the occasions the court addressed juror questions without defendants present, waived Spann's and Haidl's presence in chambers and Barnett did so for Nachreiner. (See *Riel*, *supra*, 22 Cal.4th at p. 1196 [defendant may waive presence through counsel].) Also, defendants themselves executed a standard section 977 waiver of their presence for such matters before trial.[10] (See § 977, subd. (b)(1) [providing that, for felony charges, "the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the . . . imposition of sentence"]; see also § 1043, subd. (a) ["Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial"].)

Spann asserts his pretrial waiver was ineffective because, contrary to its terms, he was not represented in chambers "by the presence of *his* . . . *attorney* . . . ." (Italics added.) But as discussed, the record reflects Spann agreed to have Scalisi specially appear on his behalf, including to respond to jury questions. As such, he was

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make individual decisions, or do you want us to retain the book until our deliberations on all counts are completed" and "If a defendant is out of the room during the commission of one of the incidents, is he exempt from guilt by aiding and abetting by virtue of his absence . . . ."

[10] The waiver stated, in pertinent part: "The undersigned defendant, having been advised of his/her right to be present at all stages of the proceedings, including but not limited to presentation of and arguments on questions of law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause, including when . . . questions of law are presented to or considered by the court. The undersigned defendant hereby requests the court to proceed during every absence of his/hers which the court may permit pursuant to this waiver, and hereby agrees that his/her interest will be deemed represented at all times by the presence of his/her attorney the same as if the defendant himself/herself were personally present in court . . . ." Defendants executed the waivers before their first trial; they make no claim the waiver was ineffective for their second trial.

represented in chambers by his attorney. Consequently, the trial court committed no error or constitutional violation in not including Spann or his codefendants in the in-chambers discussions.

3. The Trial Court Properly Answered the Jury's Questions

(a) The Jury's First Question

Defendants contend the trial court's answer to the jury's first question during deliberations was erroneous because the court did not address aider and abettor liability or reinstruct the jury concerning their defenses that Doe was not too intoxicated to exercise the requisite judgment or they reasonably believed she was not too intoxicated to do so. The jury did not ask about aider and abettor liability or anything pertinent to the defense theories.[11]

We also note that defense counsel participated in formulating the court's response to the jury's question and agreed that response was proper; nor did Morreale object when he reappeared the next day, though the court solicited objections and Morreale objected to the court's response to a later jury question. Consequently, defendants' challenge is forfeited. (*People v. Roldan* (2005) 35 Cal.4th 646, 729 (*Roldan*); see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 [appellate challenge forfeited where "defendant both suggested and consented to the responses given by the court"].) Defendants also observe the record does not reflect the court provided its response to the jury's question, but we presume the court performed its duty. (Evid. Code, § 664; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550.)

Overlooking defendants' forfeiture, there is no merit to their claim the court should have amplified its response to the jury's question with unspecified reinstruction concerning aider and abettor liability or their defenses. The jury asked a specific question that focused on whether CALJIC No. 1033 was internally inconsistent

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[11] The jury asked: "As it relates to jury instruction(s) page(s) 32 and 38[:] [¶] The definition of 'specific intent' as put forth in lines 16-18 on page 38 appears to contradict Element 4, line 25, page 38 of the specified jury instructions. [¶] Please clarify the definition of specific intent as it relates to this case."

concerning specific intent. In effect, the jury noted that CALJIC No. 1033 provided: "The 'specific intent to cause sexual abuse,' as used in this instruction, means a purpose to injure, hurt, cause pain or cause discomfort. *It does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent.*" (Italics added.) The jury erroneously perceived an inconsistency because the instruction later requires, as an element of sexual penetration by a foreign object, that "[t]he penetration was done with the purpose and specific intent to cause *sexual arousal*, *gratification*, **or** abuse." (Italics and emphasis added.)

The jury apparently overlooked the disjunctive "or" in the instruction, causing them to ask why the element required sexual arousal and gratification when the previous definition stated neither was required. The court explained the law required neither arousal nor gratification when a defendant penetrated a victim for sexual abuse, but that, as the latter part of the instruction correctly stated, the offense was committed if the perpetrator accomplished the penetration for sexual abuse *or* for sexual arousal or gratification.[12]

Because the jury did not ask about aider and abettor liability or the defense theories, concepts on which the court already had instructed the jury, the court had no reason to reinstruct the jury on these matters for "balance[]," as defendants now claim. The trial court prudently avoided perplexing the jury by reinstructing on issues not raised in their inquiry. There was no error.

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12 Specifically, the court answered the jury's question as follows: "Page 38 of the jury instructions sets out on lines 21 through 28 the four required elements of the charged offense Penal Code section 289(e). [¶] Page 38 line 25 and 26 set[ ] out element number four i.e. the definition of specific intent required. [4. The penetration was done with the purpose and] specific intent to cause either sexual arousal, or sexual gratification or sexual abuse. [¶] Page 38 lines 16-18 defines the last phrase 'sexual abuse[.]' [¶] Page 32 sets out the legal requirement of the need to show concurrence of act and specific intent at the time of the alleged offense (here Penal Code section 289(e)). This instruction refers to page 38 for the definition of the specific intent required for violation of Penal Code section 289(e)."

(b) The Jury's Second Question

Defendants contend the trial court erred in answering the jury's second question: "Does 'specific intent' require that the Defendants had knowledge that their actions were criminal or illegal?" Defendants, including Morreale when he later appeared, objected to the trial court's answer, which we discuss below. Defendants proposed the court should answer the question this way: "The 'specific intent' requirement does not require defendant's [*sic*] had knowledge that their actions were illegal. [¶] However, the 'mental state' requirement does require that the District Attorney prove[] beyond a reasonable doubt that Jane Doe was not only so intoxicated she could not exercise reasonable judgment but, given all the circumstances, that the defendants had actual knowledge, i.e., knew Jane Doe was so intoxicated she could not exercise reasonable judgment." The trial court properly rejected defendants' proposed instruction because its second paragraph misstated the law by failing to inform the jurors the offense is also committed if the defendants reasonably should have known of her condition. (§ 261(a)(3) [rape-by-intoxication committed if the victim's "condition was known, or reasonably should have been known by the accused"].)

Defendants contend the answer the trial court gave was erroneous but, while the court said more than strictly necessary to answer the jury's question, the court did not misstate the law. The court instructed the jury as follows: "The legal term 'Specific intent' does not require proof that a defendant knew or believed he was acting illegally. [¶] To fully answer this question, each charge and each defendants [*sic*] alleged conduct must be reviewed individually. [¶] If the charge is a general intent offense (Counts 1, 3, 9 are general intent) the defendant does not need to have knowledge that their actions were criminal. See C[ALJIC No.] 3.30 page 31. [¶] The charges filed under Penal Code section 289(e) are specific intent charges (Counts 2,4-8). [¶] The specific intent for the perpetrator of the offense is to cause sexual arousal and/or gratification and/or sexual abuse (see C[ALJIC No.] 10.33 page 38.) [¶] One who engages in conduct that is an element of the charged crime is a perpetrator not an aider and abettor. [¶] An aider and abettor is defined in C[ALJIC No.] 3.01 page 30. [¶] In

other words an aider and abettor must act with knowledge of the criminal purpose of the perpetrator (sexual penetration with a foreign object when the alleged victim is intoxicated) and with a specific intent or purpose of committing or of encouraging or facilitating commission of the alleged offense [that] the accomplice by act or advise aids, promotes, encourages or instigates. [¶] *The aider and abettor need not have the same specific intent required of the perpetrator* but he must know the full extent of the perpetrator's criminal purpose and then gives aid or encouragement with the intent of facilitating the perpetrator's commission of the crime." (Italics added.)

Focusing on the italicized language above, defendants contend the court incorrectly instructed the jury on aider and abettor liability by stating the aider and abettor need not have the same specific intent required of the perpetrator. "'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator," which occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]'" (*People v. McCoy*, (2001) 25 Cal.4th 1111, 1118.) The trial court properly instructed the jury on the gravamen of an aider and abettor's specific intent, i.e., knowing the full extent of the perpetrator's criminal purpose and giving aid or encouragement with intent to facilitate the perpetrator's commission of the crime.

On the facts here, moreover, the trial court accurately specified the perpetrator's and the aider and abettor's intent for sexual penetration with a foreign object (§ 289, subd. (e)) need not be identical or coextensive since, as the court noted, the statute could be violated in multiple ways. Thus, aider and abettor liability applies when the actor intends to cause the victim sexual abuse, even if the perpetrator acted with the intent to arouse himself, provided, as the court correctly instructed the jury, the aider and abettor knew of the perpetrator's purpose and aided or encouraged the perpetrator in fulfilling it. There was no error.

Because the jury only asked if specific intent required that the defendants had knowledge their actions were criminal or illegal, the court need not have provided the

level of detail it did. But there was no error given this was the jury's second question on specific intent in as many days. Under section 1138's provision for reinstruction, the court had a "'primary duty to help the jury understand the legal principles it [wa]s asked to apply'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755), and the jury's repeated questions about specific intent justified the trial court's exposition. The court acted well within its discretion. (See *Waidla, supra,* 22 Cal.4th at pp. 745-746 [abuse of discretion standard applies].)

(c) The Jury's Third Question

Defendants also assert the trial court erred in answering one of the jury's questions in the afternoon session on Monday, March 21st: "If a defendant is out of the room during the commission of on[e] of the incident(s), is he exempt from guilt by aiding & abetting by virtue of his absence." Again, the challenge is forfeited because defense counsel, including Scalisi specially appearing for Spann, agreed to the court's response; nor did Morreale object when he reappeared on Spann's behalf. (*Roldan, supra,* 35 Cal.4th at p. 729.)

On the merits, defendants' contentions fail. Defendants now argue the trial court should have instructed the jury that one's "absence from the room where the act occurred is evidence that the particular defendant lacked knowledge of the act performed by the codefendant, thereby defeating aiding and abetting liability . . . ." This claim is without merit because it is an incorrect statement of the law. (See, e.g., *People v. Bohmer* (1975) 46 Cal.App.3d 185, 199 [aider and abettor need not be present at offense site].) Defendants' instruction would have contradicted CALJIC No. 3.01, which states, "A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime."

The trial court responded to the jury's question as follows: "Please refer to aiding and abetting instructions C[ALJIC Nos.] 3.00 and 3.01,[13] pages 29 and 30. If

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13 CALJIC No. 3.00 states: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal,

after looking at these instructions and you believe you need further assistance, please advise." (See *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [in its discretion, trial court may "merely reiterate the instructions already given"].) There is no merit to defendants' complaint the trial court should have admonished the jury not to give its additional instructions any more significance than other instructions already provided. The trial court instructed the jury at the outset of deliberations that the instructions should be considered as a whole and "[t]he order in which the instructions are given has no significance as to their relative importance." (CALJIC No. 1.01.) We presume the jury understood and applied this principle. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.) Nor, again, is there any merit to defendants' claim the trial court should have reinstructed the jury at this point on their defenses that Doe was not too intoxicated to exercise the requisite judgment or they reasonably believed she was not too intoxicated to do so. Nothing about the jury's question concerning a defendant's absence from the room at a given time implicated these theories. There was no error.

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regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission or attempted commission of the crime." Appellants complain the court did not instruct on knowledge and intent relating to appellants' defenses of consent and good faith belief in consent.

CALJIC No. 3.01 states: "A person aids and abets the commission or attempted commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

D. Sentencing Issues

1. The Lifetime Registration Requirement Was Mandatory

Defendants contend the trial court erred in concluding that, once it determined in a postconviction fitness hearing they were not suitable for a juvenile court disposition, it lacked discretion to exempt them from mandatory, lifetime sex offender registration. The trial court did not err.

The Sex Offender Registration Act does *not* require mandatory registration for juveniles who receive juvenile court dispositions for committing sexual penetration with a foreign object by intoxication. (§ 290.008, subd. (c).) In contrast, "[a]ny person" who has been "convicted in any court of this state" of this offense must register as a sex offender under section 290, subdivision (c). Under this latter provision and its antecedents, registration is a "statutorily mandated element of punishment" (*People v. McClellan* (1993) 6 Cal.4th 367, 380) that "applies automatically when a person is convicted of one of the enumerated offenses" (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825), "leav[ing] no discretion in the trial judge to not require registration if one or more of the listed violations occurs" (*People v. Monroe* (1985) 168 Cal.App.3d 1205, 1209).

Defendants filed postconviction motions seeking disposition under juvenile court law instead of adult sentencing. Section 1170.17 states that when "a person is prosecuted for a criminal offense committed while he or she was under the age of 18 years and the prosecution is lawfully initiated in a court of criminal jurisdiction without a prior finding that the person is not a fit and proper subject to be dealt with under the juvenile court law, upon subsequent conviction for any criminal offense, *the person shall be subject to the same sentence as an adult convicted of the identical offense, . . . except under the circumstances described in subdivision (b) or (c)*." (Italics added.)

Subdivisions (b) and (c) of section 1170.17 provide for a fitness hearing to determine whether the juvenile qualifies for a disposition in juvenile court instead of adult sentencing. The prosecutor's decision to charge defendants with assault with great bodily injury provided the statutory basis to file charges directly in superior court instead

of juvenile court. (See Welf. & Inst. Code, § 707, subds. (b), (d)(1); see *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 562 (*Manduley*).) Alternately, the prosecutor could have initiated a pretrial fitness hearing to determine defendants' suitability for a juvenile court disposition. (Welf. & Inst. Code, § 707, subds. (a), (d); *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 805.) In any event, because the jury acquitted defendants of the assault with great bodily injury charge, the trial court proceeded with the posttrial fitness hearing under section 1170.17, subdivision (c). Under that subdivision, defendants' acquittal on the § 707(b) charge (assault with great bodily injury) entitled them to "a rebuttable presumption that the person *is* a fit and proper subject to be dealt with under the juvenile court law . . . ." (§ 1170.17, subd. (c); italics added.)

Accordingly, the prosecutor moved to rebut the presumption at the fitness hearing. (§ 1170.17, subd. (c)(2).) At the hearing, the trial court concluded the prosecution by a preponderance of evidence carried its burden to demonstrate that defendants were not "fit and proper subject[s] to be dealt with under the juvenile court law" (*ibid.*), based on the following statutory criteria for the court's determination: "(A) The degree of criminal sophistication exhibited by the person. [¶] (B) Whether the person can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. [¶] (C) The person's previous delinquent history. [¶] (D) Success of previous attempts by the juvenile court to rehabilitate the person. [¶] (E) The circumstances and gravity of the offense for which the person has been convicted." (§ 1170.17, subds. (b)(2), (c)(2).)

Defendants argue the procedure established in section 1170.17 "should not control the separate question whether minors, adjudicated wards in juvenile cases *or* convicted of criminal offenses and sentenced, are required to register under Penal Code section 290." (Original italics.) But because the trial court determined defendants were not fit and proper subjects to receive a disposition under juvenile court law, defendants were, under the Legislature's mandatory ("shall") language of section 1170.17, subdivision (a), "subject to the same sentence as an adult convicted of the identical offense . . . ." In other words, once the trial court determined defendants did not meet the

enumerated criteria for a juvenile disposition (§ 1170.17, subd. (b)(2), (c)(2)), the court had no discretion to evade adult sentencing provisions and instead order juvenile dispositions for defendants, including nonregistration under section 290.008, subdivision (c). Rather, a "person shall receive a disposition under the juvenile court law *only if* the person" meets the enumerated criteria (§ 1170.17, subd. (b)(2); italics added.) Thus, contrary to defendants' argument, the Legislature *has* determined in section 1170.17 that the question of registration, a requirement of adult sentencing, is *not* separate from the minor's fitness for a juvenile disposition.

Defendants misplace reliance on *In re Derrick B* (2006) 39 Cal.4th 535 (*Derrick B.*). They suggest the case supports their position minors are not subject to mandatory registration because *Derrick B.* holds the minor there was improperly ordered to register pursuant to former section 290, subdivision (a)(2)(E), now section 290.006. That statute provides that if a defendant's conviction is not for an offense that requires mandatory registration, the trial court may nevertheless order registration in its discretion if at the time of the "conviction or sentencing" the court makes a finding the defendant committed the offense "as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.) *Derrick B.* is distinguishable, however, because the minor there *actually received a juvenile disposition* committing him to the California Youth Authority. If anything, *Derrick B.* supports the proposition a minor convicted as an adult is subject to the same registration requirement as an adult convicted of the same offense.

In *Derrick B.*, because the minor's sexual battery offense and juvenile disposition did not require mandatory registration, the prosecution relied on former section 290, subdivision (a)(2)(E)'s provision for registration at the trial court's discretion. But the Supreme Court held references to "'[c]onviction' and 'sentencing' [in subdivision (a)(2)(E)] are terms of art usually associated with adult proceedings. Because the Legislature used these terms, we construe this subdivision as applying only in cases of adult convictions." (*Derrick B., supra*, 39 Cal.4th at p. 540.) Accordingly, the court held the discretionary, catch-all registration provision in former section 290, subdivision (a)(2)(E) applied exclusively to adult offenders. (*Derrick B.*, at pp. 540-546.)

The only portion of *Derrick B.* that is relevant here is the court's observation in a footnote that "[a] juvenile tried as an adult would, of course, be treated as an adult for purposes of the registration requirement." (*Id.* at p. 540, fn. 5.) As such, we find no error in the trial court's order imposing the mandatory registration requirement in section 290 once it determined defendants to be unfit for juvenile dispositions.

2. No Equal Protection Violation in the Registration Requirement

Defendants argue their constitutional right to equal protection exempted them from sex offender registration because, as noted, juveniles who are adjudicated wards of the court for the same offense are exempt. (See § 290.008, subd. (c) [omitting sexual penetration with a foreign object by intoxication as an offense requiring registration for persons "having been adjudicated a ward of the juvenile court"].) Defendants' claim fails.

"'The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed. . . .'" (*People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116.) "The initial inquiry in any equal protection analysis is whether persons are '*similarly situated* for purposes of the law challenged.'" (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 47, original italics.) "'The "similarly situated" prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.' [Citation.] . . . There is . . . no requirement that persons in different circumstances must be treated as if their situations were similar.' [Citation.]" (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1383.)

The trial court's findings at the fitness hearing demonstrate defendants were not similarly situated with juveniles who are not required to register because they have received a juvenile disposition. Weighing the factors enumerated in section 1170.17,

subdivisions (b)(2) and (c)(2), the trial found defendants were not amenable to the care, treatment, and training programs available if placed under the juvenile court's jurisdiction. Although defendants had no prior delinquent history and thus had not failed prior juvenile court rehabilitative attempts, these factors were outweighed by defendants' dim prospects for rehabilitation given their callous conduct and the gravity of their offenses. Specifically, the court found the anger and indifference manifest in defendants' conduct revealed a hardened criminality that was particularly troubling given Doe had been willing to engage in consensual sexual activity with each of them. The trial court described the circumstances and gravity of the offenses as "disturbing" and "extremely sick," revealing a "gravely ill state of mind." The trial court found defendants could not be rehabilitated before the expiration of the juvenile court's jurisdiction.

Because "juvenile proceedings are primarily 'rehabilitative'" (*In re Eddie M.* (2003) 31 Cal.4th 480, 507), a finding of unfitness serves to "weed out minors from whom society needs protection and for whom consideration as [a] juvenile[ ] is unlikely to make a difference" (*Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, 1659). Section 290's registration requirement similarly aims at protection: first, by assuring that those convicted of enumerated offenses are " ""'readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future . . .'"" and, second, by providing notice to "members of the public of the existence and location of sex offenders so they can take protective measures." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196.) The trial court's finding defendants were not amenable to rehabilitation while under juvenile court jurisdiction furnishes a rational basis for the Legislature's registration requirement, namely, public protection. And absent amenability to rehabilitation, defendants were not similarly situated with minors receiving juvenile dispositions, against whom, with their presumptive rehabilitation, the public would not need protection. Since the groups are not similarly situated, defendants suffered no equal protection violation.

3. No *Blakely* Error at the Fitness Hearing

Defendants claim they were entitled under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) to a jury trial on whether they were fit and proper subjects for a juvenile disposition instead of adult sentencing. They argue the trial court's evaluation of their level of criminal sophistication, the circumstances and gravity of their offenses, and other statutory factors (§ 1170.17, subds. (b)(2), (c)(2)) on a preponderance of evidence standard deprived them of their right to have the jury determine beyond a reasonable doubt the facts affecting their punishment. They assert that by virtue of their minority the statutory maximum for their offenses was a juvenile disposition, and the trial court's contrary determination therefore violated their Sixth Amendment right to a jury trial under *Blakely*. Defendants' claim has no merit.

First and foremost, a fitness hearing is not a criminal proceeding; consequently, the Sixth Amendment right to a jury trial does not attach and *Blakely* has no application. Unlike a criminal trial, a juvenile fitness hearing does not involve adjudication of the defendant's guilt. To the contrary, even in fitness hearings held before trial (Welf. & Inst. Code, § 707, subd. (a)), the hearing is conducted on the premise the minor committed the alleged offense. (*People v. Superior Court (Rodrigo O.*) (1994) 22 Cal.App.4th 1297, 1303.) This is so because the issue is whether the resources of the juvenile court system are appropriate and sufficient to accommodate and rehabilitate the individual if he or she receives a juvenile disposition. "Whether the youth committed the act alleged in the petition is not the issue . . . ; the sole question is whether he would be amenable to treatment in the event that he is ultimately adjudged a ward of the court." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 716, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 33-34.) Accordingly, the focus of the hearing is the juvenile's fitness for the "care, treatment and training program[s] available in such facilities." (*Wong*, at p. 716; Welf. & Inst. Code, § 707, subd. (a)(1).) The hearing thus resembles a special proceeding that is civil in nature, rather than criminal, and for which there is no Sixth Amendment right to a jury trial. (Cf. *People v. Rowell* (2005) 133 Cal.App.4th 447, 451 [constitutional right to a jury trial inapplicable

in civil commitment proceedings].) *Blakely*, which vindicates the Sixth Amendment right to a jury verdict in a criminal trial, is thus inapposite.

Second, defendants' argument is based on the flawed premise that a juvenile disposition constituted the statutory maximum for their offenses. With Proposition 21, the voters authorized the direct filing of charges under Welfare and Institutions Code, section 707, subdivision (b), in criminal court instead of juvenile court. (*Manduley*, *supra*, 27 Cal.4th at p. 555.) Under that procedure, defendants received a jury trial when they otherwise would not have been entitled to one. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528 [no Sixth Amendment right to a jury trial for juvenile delinquency proceedings]; see *People v. Nguyen* (2009) 46 Cal.4th 1007, 1023 [discussing *McKeiver*].) Based on the jury's verdict, the maximum sentence at the relevant time under California's determinate sentencing law was the midterm. (*Cunningham v. California* (2007) 549 U.S. 270, 288; former § 1170, subd. (b).) The trial court met, but did not exceed, this limit by imposing the midterm sentence of six years for defendants' offenses. (§ 289, subd. (e).) Because the trial court's sentence did not exceed the statutory maximum, *Blakely* is not implicated. (See *In re Gomez* (2009) 45 Cal.4th 650, 653-654 [*Blakely* applies to sentences beyond the """standard range"""].)

The Attorney General aptly points out, moreover, that in seeking a juvenile disposition, defendants sought to be relieved of the consequences authorized by the jury's verdict, including the midterm maximum and mandatory sex offender registration. The registration requirement would disappear with a juvenile disposition (see § 290.008) and because defendants either were about to turn or had already turned 21 at the time of sentencing, a juvenile disposition would have resulted in significantly less time in juvenile facilities than their six-year prison sentences. (See Welf. & Inst. Code, § 607, subd. (a).) But *Blakely*, and its antecedent, *Apprendi v. New Jersey* (2000) 530 U.S. 466, do not apply to factual findings that could *reduce* a sentence below the statutory maximum. (See *People v. Murphy* (2004) 124 Cal.App.4th 859, 863 ["Whatever facts the trial court may have found in refusing to dismiss the prior strike finding under [*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497] did not increase defendant's

sentence within the meaning of *Apprendi* and *Blakely*"]; *People v. Benitez* (2005) 127 Cal.App.4th 1274, 1278 ["Because a defendant's eligibility for probation results in a *reduction* rather than an increase in the sentence prescribed for his offenses, it is not subject to the rule of *Blakely*"]; *People v. Dove* (2004) 124 Cal.App.4th 1, 11 [neither *Apprendi* nor *Blakely* apply to a trial court finding that the defendant is ineligible for drug treatment under Proposition 36].) Accordingly, defendants' Sixth Amendment sentencing challenge is without merit.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.